

New Zealand's Decriminalization Model

FOR ADVOCATES

by Sienna Baskin, Esq.ⁱ | JUNE, 2019

In 2015, I spent three months in New Zealand (Aotearoa) studying its model of sex work decriminalization with the New Zealand Prostitutes Collective. Given the interest in decriminalization in the United States this year, I wanted to share information with the activists, advocates, allies and funders who are working for decriminalization of sex work in the US. This white paper summarizes information about the [how](#) US activists can apply lessons learned. Citations are included throughout for more in-depth reading.

Why New Zealand?

In 2003, New Zealand passed the Prostitution Reform Act. Although the law has flaws, it is the most comprehensive decriminalization of sex work of any country in the world. The US, by contrast, has one of the most punitive approaches to sex work among Western “First world” democracies. How was New Zealand able to become the first, and still only nation to achieve this? What do the differences between New Zealand and the US have to teach us about our own prospects of success? Below are some facts and observations about these two countries.

New Zealand

United States

CULTURAL IDENTITY

- » From its earliest days as a British colony, New Zealand has identified as a “social laboratory.” It created a socialist-inspired welfare state, the first national public health system, and was the first country to have women’s suffrage. New Zealand has proudly taken unpopular but common sense approaches to policy throughout its history.ⁱⁱ
- » Due to the strong influence of indigenous Maori culture and the large proportion of immigrants (24% of residents were born outside of New Zealand), multiculturalism and tolerance of difference are intrinsic to New Zealand culture.ⁱⁱⁱ
- » New Zealand is one of the least religious countries in the world: 42% claimed no religion in the 2013 census.^{iv}
- » New Zealand holds the value of “fairness” as pre-eminent.^v This leads to a tendency to consider the rights and needs of all community members equally, and a respect for process – once an issue has been fairly and thoroughly vetted, the outcome will stand.
- » New Zealand’s overall approach to criminal justice has been somewhat influenced by Maori culture, which defaults to community-based restorative justice in response to violations of community norms and other harms. This has led to lower incarceration rates and less punitive laws than the US.^{vi}
- » The US has high rates of inequity and poverty, compared to New Zealand, and much less comprehensive social safety nets.
- » US politics have been characterized by our religious right and our culture is strongly influenced by Christianity and puritanism. Only 18% of Americans identify as non-religious in 2016.^{vii}
- » Americans hold the value of “freedom” as the most important. “Fairness” has even been denigrated by public figures – “life isn’t fair” is a common refrain.
- » The US has one of the most punitive criminal justice systems and highest rates of incarceration in the world.

GOVERNMENT STRUCTURE

- » New Zealand's political system is one of the most centralized in the world - with almost all powers invested in its Parliament, which both legislates and administers the laws. There are no states and cities have very limited powers.^{viii}
- » New Zealand has not written constitution, and instead an elastic concept of natural rights.
- » The New Zealand Parliament leans left and the government in place in 2003 (at the time of decriminalization) was very progressive, even by New Zealand standards.
- » The US is a federalist nation with a relatively weak national government and most powers held on the state level.
- » The US has a constitution, a supreme law of the land, which limits which rights are considered fundamental.

THE SEX INDUSTRY PRIOR TO DECRIM

- » Prior to the passage of the Prostitution Reform Act, only offering to sell sex, living on the avails of prostitution, and brothel-keeping were crimes. **Purchase of sex was not a crime.** Even purchasing sex from a minor was only a crime if the person was under 16.^{ix}
- » Even the selling of sex was somewhat tolerated: police monitored the industry through registries of known sex workers, with the threats of arrest and fines for noncompliance.^x
- » All acts related to the selling or purchase of sex are criminalized in almost all states, and sex workers are also punished through juvenile, housing, family, and immigration systems of laws.
- » We also have had vigorous law making to eliminate sex trafficking and exploitation of minors through harsher criminal penalties. These laws have drawn clear lines between "good" victims and "bad" voluntary sex workers, making it hard for these populations to find common cause.

Lessons for U.S. Activists

- ▶ **Choice of venue is important.** While activists cannot decriminalize sex work in the entire country in one fell swoop due to the US's federalist system, a state-by-state campaign offers other opportunities. Campaigns could target states that share some characteristics with New Zealand: where multiculturalism and tolerance of difference are ascendant, where prosecution of prostitution is already on the decline, where novel and compassionate approaches to other social issues have been tried and succeeded.
- ▶ **Values are important.** In New Zealand, the values of fairness and consideration for all members of society, of common sense and of social welfare were strong headwinds in favor of decriminalization. What values are held strongly across the US, or in particular states or regions, that might define the kinds of arguments and messages will carry the day in the US?
- ▶ **True decriminalization in the US is dependent on larger changes.** The US is so entangled in broken-windows policing, harsh immigration enforcement and other policies that continually augment the reach of the criminal justice system, that it will be difficult to ensure that erasure of certain criminal charges have the intended effect - that the same individuals are not criminalized by other means.

Timeline for Decriminalization

The history of the Prostitution Reform Act runs parallel to the history of the New Zealand Prostitutes Collective. This single organization serves the nation's sex workers, created the knowledge and evidence-base for understanding the industry, unified the movement behind reform, and now is implementing the law. The following is a summary of important moments in their campaign for decriminalization.

1988

- » NZPC was founded by sex workers and funded by New Zealand's Department of Health to head off the threatening HIV crisis by empowering and protecting sex workers' sexual health.^{xi} An initial grant in 1988 was part of a broader public health approach to HIV in the 1980's, which included decriminalizing sodomy and facilitating needle exchanges.^{xii} This approach was largely successful in integrating those most at risk and keeping HIV transmission rates very low.^{xiii}
- » NZPC quickly set up drop-in centers and health clinics in major cities, organized subcommittees of male, Maori, and transgender sex workers, and began networking with every government agency.

1991

- » In 1991, NZPC proclaimed that they could not protect the health of sex workers under the current system of criminalization, and called for a study commission to review the law.^{xiv} The first outcome of this committee was a police directive to not seize safer sex materials.

1996

- » In 1996, a series of murders and rapes of sex workers spurred empathy and action, and the Prostitution Reform Act to decriminalize the industry was drafted and introduced in 1998.
- » A period of intensive lobbying ensued, with NZPC rallying feminists, Maori groups, trade unions, and faith groups to their cause.
- » NZPC has called the campaign "an intellectual, not a muscular" one.^{xv} No groups were funded to do the campaign work, so NZPC and their supporters focused narrowly on gaining the necessary votes in Parliament.^{xvi} A few strategies proved essential:
- » NZPC worked collaboratively with researchers and academics - helping them craft participatory and ethical research of the industry while building the evidence-base for their cause.
- » NZPC realized that Ministers of Parliament needed to hear from sex workers who shared their background and identity. They were able to enlist Christian sex workers to speak to Christian lawmakers, Pacific Islanders to speak to Pacific Islanders, etc.

2003

- » The law went through 3 readings in Parliament, and each was hard fought, with key support coming from the Prime Minister and votes changing each time, and some difficult compromises were made that still plague the law. The bill eventually passed by only one vote (2003)
- » Attempts to repeal the law were mounted, and defeated by wide margins.

Lessons for US Activists

- ▶ **Unity is valuable:** In the US, we have no leading organization like NZPC. Instead, we have many local, regional and some national organizations that defend, organize or serve sex workers, that rarely have funding, let alone national government funding and endorsement. Different visions and strategies are held by different groups - to say nothing of the divisions sown by anti-trafficking narratives. However, a shared purpose and vision across the movement would lead to well-developed policy proposals, shared learning across states, and a powerful “drumbeat” of similar messages and proposals.
- ▶ **Public health is a strong argument:** NZPC realized that public health cannot be achieved when individuals are living under the threat of criminalization for their sexual conduct. In the US, with 6 times the HIV rate of New Zealand, where HIV is more concentrated in at-risk populations, this argument is even more urgent. Health organizations can be essential allies in this fight.
- ▶ **Interim campaigns that reduce harm can be stepping stones to decrim** if they help to build expertise, political voice of sex workers, and political will. Such campaigns could include, as they did in New Zealand, study commissions of the current law, decriminalization of condom possession, and other measures if they benefit and unite sex workers.
- ▶ **Decrim was hard, even in New Zealand:** Even with a very progressive government, an overall conducive culture, a unifying organization, and federal funding, it took years to achieve decriminalization in New Zealand. It may be an even longer haul in the US.
- ▶ **Strategy choices matter:** The strategies NZPC employed are instructive, but different strategies might work best in the US or in particular states. Will an intellectual campaign focused on moving particular policy-makers be most effective, or is a muscular campaign for broader cultural change needed first? Should the focus be on building scientific evidence, or are policy-makers more influenced by other factors?
- ▶ **Developing the political voice of sex workers is paramount:** No “expert” can replace the persuasive power of sex workers of diverse identities and experiences speaking for themselves. In New Zealand, it was helpful to show elected officials that sex workers were more like them than different from them - that they shared culture and experience and should be trusted in their policy recommendations. In the US this will require making it safe enough for sex workers to come forward, and supporting them through the discrimination they will face.

What does the law say?

The Prostitution Reform Act is worth reading in its entirety.^{xvii} Offered below is a summary of each section.

- 1.** The PRA begins with an introduction stating its purpose: to create framework that safeguards human rights of sex workers, promotes their occupational health and safety, protects the public health, and prohibits promoting and patronizing persons under 18.
- 2.** The laws that criminalized activities associated with sex work are repealed: soliciting (offering sex for sale), living off the earnings of a sex worker, procuring sexual intercourse for another person, and keeping a brothel.
- 3.** A contract for sexual services is a legal, enforceable contract – but sex workers can refuse to provide sexual services at any time and clients will only be entitled to funds returned.
- 4.** Commercial sex business operators, sex workers and clients are required to take “all reasonable steps” to minimize risk of STI transmission, with civil fines possible for failure to do so. This provision does not mandate universal condom use, mandate testing, or threaten criminalization of any party.
- 5.** A person who operates a commercial sex business with more than 4 sex workers determining either when or where they work, the conditions in which they work, or the amount of money they get paid, has to get a certificate to run a brothel. These are obtained from the Registrar of District Court for a small fee, and the Registrar “must” issue them if the requirements are met – there is no discretion. Applicants must show that they have not been convicted of certain crimes involving violence, sexual abuse, money laundering, and drugs. No other government agency can view the list of certificate holders.
- 6.** One can operate a “small owner-operated brothel” of less than 4 persons working collectively without getting a certificate.
- 7.** Commercial sex businesses cannot advertise on radio, television, or print except in the classifieds section. They can advertise on the internet and through signage in public places.
- 8.** Cities have very limited powers: they can only limit where commercial sex businesses are located and where they post signage, but even these restrictions must not be too burdensome.
- 9.** New crimes were created for inducing or coercing a sex worker to provide services or to give over earnings, and for assisting, profiting from, or patronizing minors engaging in sex work.
- 10.** Refusing to do sex work cannot affect a person’s eligibility for government services, and there is no waiting period for unemployment if someone wants to leave sex work.
- 11.** Migrants on temporary work, travel or student visas are prohibited from engaging in the sex industry as sex workers or as commercial sex business operators. They cannot be criminally prosecuted, but can be deported. Legal permanent residents can be deported if found to be running a commercial sex business.
- 12.** Public health inspectors can enter a commercial sex business to inspect for violations of the safer sex requirements, but can only enter a private home with a warrant. Police can only enter with a warrant concerning the use of minors or operating without a certificate. Sex workers are entitled to the same health and safety protections as all workers. As such, labor inspectors also have limited inspecting powers.
- 13.** The law also established a Prostitution Law Review Committee to assess the outcomes of the PRA 5 years after its passage.
- 14.** Other laws passed around the same time as the PRA helped to further implement its purpose, including the Clean Slate Act, which allowed those with criminal records for sex work to have them sealed, and destroyed the registry of known sex workers.

Lessons for US Activists

▶ **A decriminalization law can do more than remove criminal penalties.** Decriminalization is often thought to mean that no regulations or legal structures apply to the sex industry. But if sex work is not a crime, it is work, business, and sex – all activities to which laws apply. Legal structures can be necessary to establish and enforce workers' rights. Thus it is strategic to fully flesh out how laws should apply to the sex industry, instead of leaving their design to later moments and other decision-makers.

▶ **Define the purpose of the law from the outset, and evaluate every provision through this lens.** The PRA defines one intent as protecting the human rights of sex workers – and this statement has been a vital reference point in implementation. In other countries, the purpose of regulatory frameworks is to discourage sex work and reduce the size of the industry. For example: other systems impose heavy burdens and costs on managers and sex workers, criminalizing or penalizing any deviation from these requirements, hoping to make it so difficult that people opt out of the industry. The PRA takes a different approach. It does regulate the industry, but with a light touch that makes it easy to comply. It is relatively easy to get a certificate to run a business, and those who cannot get a certificate can still work in collectives or individually, on the street or in private residences. The goal is to bring the whole industry in all of its variety into legality, because this is what protects human rights.

▶ **The sex industry may need some unique laws.** The theory of decriminalization is to treat the sex industry like any other industry. But every industry is unique: a tax preparer does not operate the same way as a nail salon, and different laws apply to each. In New Zealand, it was agreed that sex workers need to advertise, but not in a way that every member of the public has to see. The PRA also exempted sex work from a list of jobs you must be willing to work before relying on public benefits. And even the sex work transaction creates a legal contract, we do not want clients of sex workers to have the right to compel sexual services. Provisions that protect rights and balance interests can be written into the law.

▶ **But sex industry specific laws should not hamper the intent of decriminalization.** The provision excluding migrants from participation in the sex industry was introduced late in the process as a compromise with lawmakers concerned with international human trafficking, though this has never been a significant problem in New Zealand. Migrants were excluded from being able to engage in sex work, even if they were allowed to do other work. This provision has had negative effects and been broadly critiqued, but has proven difficult to change. Sex industry-specific laws should be evaluated through the lens of whether they have the intent and effect of protecting sex workers' human rights.

Effects of the Reform

It is implementation more than intent that matters most for those affected by the law. The bulk of my research focused on the effects of the PRA, as documented by the Prostitution Law Review Committee in 2008^{xviii} and subsequent studies. I also interviewed sex workers, government officials, and NGO's. A selection of the most important results is below.

The Prostitution Law Review Committee was established by the PRA, and included a nun, a doctor, sex workers, commercial sex business operators, a City Councilor, a criminologist, a public health official, social workers, and a retired police commissioner. Their research included interviews with 38% of all sex workers in the country. The resulting report showed that while the effects of the law were still unfolding, the PRA significantly improved the human rights situation for sex workers. The publication of this report put criticism of the law mostly to rest. All quantitative findings below refer to this report.

- » **Police/Sex Worker Relationship:** The most dramatic effect of the PRA that I found in my time in New Zealand was the change to the relationship between sex workers and police. Overnight, vice squads were disbanded and raids on parlors ceased. Police instead became a source of protection and cooperation. NZPC now has a good relationship with local police departments, and 26% of sex workers reported getting information about a potential abuser from police. Perpetrators have been convicted of rape, of removing a condom during sex and of harassment. Murders of sex workers since the PRA have been followed by swift investigations and convictions. Sex workers now report crimes in relatively high numbers, showing new trust in the system. Thirty-two percent of sex workers who experience rape in New Zealand report the crime to the police (only 25% of rape victims in general report the crime in the US).^{xix}
- » **Rates of Violence:** Sex workers still experience violence after the PRA: in 2008, 9.8% had been physically assaulted, 3% had been raped, 4.7% had been held against their will in the past 12 months.^{xx} This statistic is often cited outside of New Zealand to claim decriminalization made things worse, but there are no pre and post studies available to be able to determine whether violence increased or decreased. However, 25% of sex workers stated they felt safer from violence and more able to assert their rights; 67% felt more able to refuse clients.
- » **Trafficking in Persons:** Effects on human trafficking are difficult to claim, as New Zealand had very low levels of trafficking in the industry both before and after the law reform. However, the PRA made changes that make sex workers less vulnerable to exploitation. The PRA also added a new crime against exploitation of domestic sex workers. Commercial sex businesses stopped charging "shift fees" that led to indebtedness, and improved working conditions in compliance with the law, and to retain staff. Sex workers are now more likely to have written contracts with employers. Workers now have the option of working for themselves or collectively, so are freer to leave exploitative bosses. One sex worker successfully sued her employer for sexual harassment – showing new norms can be established in the industry.
- » **Health Impact:** The research found indicators of health to be remarkably high. 86.9% of sex workers had regular checkups and health exams, and 53.9% told their GP about doing sex work. The HIV rate is low in general and almost nil for sex workers.^{xxi} This trend was present before the PRA, due to universal healthcare, NZPC's free anonymous services, and the common-sense policies that enabled NZ to avoid a serious HIV crisis.

- » **Occupational Health and Safety:** After the PRA passed, WorkSafe (New Zealand's OSHA agency) established comprehensive guidelines for occupational health and safety in the industry.^{xxii} However, after seeing that the sex industry was not a high-risk field compared to others, the Ministry of Health and WorkSafe decided not to routinely inspect commercial sex businesses but to respond if there was a complaint, which has been rare. NZPC has actually pushed for more government outreach so that these agencies can be a greater resource to sex workers.
- » **Size of the Sex Trade:** The PRA did not result in growth of the sex industry, as was feared. This is likely because the legislation removed barriers to exiting the industry (criminal records), while also reducing barriers to entry (threat of criminalization) – resulting in the number remaining relatively stable. Only 6.6% of sex workers reporting they needed but could not find a way to leave sex work.
- » **Indoor vs Outdoor Sex Work:** One anticipated outcome of decriminalization was that street-based sex workers would move indoors and work in managed businesses. This did not happen, but there was movement from managed businesses to collectives and independent work (sometimes on the street). This revealed that when you remove the threat of arrest, there are advantages to working independently, and even to street work.^{xxiii} Mobility and flexibility within the industry gives sex workers agency and choice, and likely improves safety.
- » **Migrant Sex Workers:** As anticipated, the exclusion of temporary migrants in the law has limited the positive effects of the law for such workers. The only governmental agency that is still the enemy of sex workers is Immigration (INZ), which investigates commercial sex businesses looking for migrants and tries to deport them.^{xxiv} This has not stopped migrants from working in the industry, but has meant they have to work underground. While migrants are largely not in trafficking situations, they are more likely to work in managed businesses with lower standards, and less likely to call the police if harmed.^{xxv} One indicator of the stress on migrant sex workers is poor health: they have similarly low rates of HIV but higher rates of illnesses like UTIs and colds.^{xxvi}
- » **Youth:** Minors are not more likely to work in the sex industry after the PRA. The Review Committee found around 200 minors nationwide who trade sex. The major change since the PRA is that minors who sell sex are no longer at risk for arrest,^{xxvii} while patrons and promoters of underage sex workers are now more vigorously prosecuted.^{xxviii} These prosecutions have not solved the underlying root causes leading minors into the industry. Ironically, the laws against promoting minors mean they can only work on the street, where violence is more of a risk. However, decriminalization has made it easier to reach these youth and openly address their concerns.
- » **Public Awareness & Stigma:** New Zealanders have responded mostly positively to the PRA. However, stigma persists in sex workers' experiences in families and communities.
- » **City Attempts to Restrict Sex Work:** Some cities have sought to restrict the sex industry by passing zoning restrictions on commercial sex businesses – these are overturned by the national government if they are too restrictive, but cities keep attempting them.^{xxix} In Auckland, the largest city, efforts were made to ban street-based sex work in two neighborhoods, even after research showed only about 20 sex workers were active in these areas.^{xxx} This bill, which required approval by Parliament, led to an active period of lobbying on both sides, and was eventually voted down as out-of-keeping with the intent of the PRA. However, the smaller city of Hamilton just attempted the same.^{xxxi}

Lessons for US Advocates

- 1. Include a review process in any decriminalization bill,** establishing a neutral and diverse body with resources to do the research needed to show the effects of the law. Such research can make use of sex worker-academic partnerships established in the lead up to reform. Continuing to document the effects of reform is essential to protecting, improving and replicating the reform.
- 2. The positive effects of decriminalization might be even more pronounced in the US.** In areas where the effects of decriminalization were less noticeable in New Zealand, such as in HIV transmission and human trafficking, conditions were already better before the reform. In the US, HIV and human trafficking are more common, as well as police corruption and violence. Removing criminalization will not make all of these problems vanish overnight, but it would make it more possible for sex workers to report crimes, to access healthcare, to negotiate condom use, to work independently. It will make it possible for service, advocacy, and governmental organizations to tackle the problems sex workers face without having their efforts undermined by criminalization. The possibilities for change are dramatic.
- 3. Anticipate efforts to repeal, narrowly interpret, or pre-empt any successes:** New laws must be drafted with these threats in mind and defended after they pass. If working on a state law, consider how cities might have the power to recriminalize or punish sex workers in other ways, or whether the federal government could restrict the operation of state laws, or whether individuals might try to challenge the law in court.
- 4. Train and monitor government agencies' roles in the sex industry:** In New Zealand, where light regulation and noninterference was established as the norm, it was easier for government agencies to do less and rely on NZPC. In the US, it is possible that agencies given any power to inspect or monitor the industry will tend the other way - overusing their powers. Finding that balance in the US will be important, especially where there is no nationally funded NGO that fills the gap in services and protection. Any agency that takes a role under decriminalization will require extensive training and internal cultural change to be able to do so competently.
- 5. Repeal more than criminal laws:** There are many laws on the national and state level that would need to be repealed or reformed in order to fully divest the state from punishing sex workers: immigration laws, housing laws, anti-discrimination laws, and myriad policies in place at government agencies. The project of decriminalization should be considered ongoing until all these changes are achieved, and even when they are, ongoing reform and improvements can be made. New Zealand's NZPC is now working to expand the non-discrimination laws to include past employment in the sex industry, clarify sex workers' employee status to improve their access to a host of rights, set best practices for employee contracts, and improve the practices of internet advertising venues.

- 6. Pay special attention to the policing of public space:** Street-based sex work is likely to be a site of conflict, as stigma manifests strongly when people feel their space is being invaded or their property values affected ("Not in My Back Yard Syndrome"). Yet some sex workers will always choose to work on the street, often for reasons they cannot change, and they will need the most vigorous defense of their rights.
- 7. Pay special attention to migrant sex workers:** A more just version of decriminalization would fully integrate migrant sex workers. In the US, this means changing federal laws that prohibit sex workers from entering the country and subjects them to deportation, and allowing students and other temporary workers to legally work in the industry: no easy feat. NZPC continues to fight for inclusion of migrant sex workers and repeal of these provisions. In the US, it will require an additional campaign to challenge federal laws – but New Zealand's experience should motivate us to do this.
- 8. Stigma will persist, and laws should try to reduce its impact:** Stigma against sex workers runs deeper and cultural change can take longer than legal reform. In the meantime, laws, policies and programs can reduce the impact of stigma. NZPC's free and anonymized system of healthcare ensured sex workers get care in spite of discrimination they might face in the public health system. Sealing criminal records, reinforcing privacy protections and providing remedies for discrimination are other ways to reduce that harm.

Conclusion

The New Zealand model, though flawed, has gone the farthest of any nation in protecting the human rights of sex workers. Reading the Prostitution Reform Act and learning from New Zealand's experience can teach us that eliminating the criminal laws is only one part of a fuller agenda of legislative, regulatory, and cultural change. Learning about the outcomes of decriminalization, in contrast to the oppressive and harmful situation sex workers face under criminalization, should motivate us to contribute however we can to campaigns for reform.

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ENDNOTES

- i I completed this research as a Fulbright Scholar in New Zealand. Before and after this period, I worked for 9 years as an attorney and co-director of the Sex Workers Project at the Urban Justice Center in New York City. I am currently director of the Anti-Trafficking Fund at NEO Philanthropy.
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